Supreme Court, U.S.
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No. 06-378

In The

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether facts that increase a defendant's sentence must be proved beyond a reasonable doubt.

2. Whether it is permissible under the Sixth Amendment for a court of appeals reviewing a sentence for unreasonableness to give greater weight to the Guidelines sentencing range than to the other 18 U.S.C. § 3553(a) factors and to give less deference to district courts that impose sentences outside that range.

3. Whether a district court has discretion under 18 U.S.C. § 3553(a) to avoid disparity between the sentence of a defendant who exercises his constitutional right to trial and that of a codefendant who pleaded *nolo contendere* but is otherwise similar.

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PETITION FOR WRIT OF CERTIORARI

William Thurston respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion, dated July 26, 2006, (Appendix ("App.") 1a–19a) is reported at 456 F.3d 211 (1st Cir. 2006). The court of appeals' stay order, dated August 15, 2006, (App. 20a) is unreported. The district court's oral statement of reasons for its imposition of the sentence on remand (App. 186a–226a), made at the sentencing hearing on June 16, 2005 (App. 46a–226a), is unreported. The district court's Memorandum of Sentencing Hearing and Report of Statement of Reasons, dated June 16, 2005, (App. 39a–45a) is unreported. The district court's amended judgment after resentencing on remand, dated June 17, 2005, (App. 30a–38a) is unreported. The district court's second amended judgment, correcting a clerical mistake, dated June 30, 2005, (App. 21a–29a) is unreported. The opinions issued before the resentencing, including this Court's opinion granting Thurston's petition for writ of certiorari, vacating judgment, and remanding for further consideration in light of *United States v. Booker* (App. 237a), are listed and included in the Appendix.

STATEMENT OF JURISDICTION

The court of appeals' judgment and opinion were entered on July 26, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." *Id.* amend. VI.

The statute providing the factors to be considered in imposing a criminal sentence, 18 U.S.C. § 3553(a), is reprinted at App. 360a–62a.

STATEMENT OF THE CASE

Pre-Trial Proceedings in District Court

In a one-count indictment, Thurston and three other former executives of Damon Clinical Laboratories were charged with violating 18 U.S.C. § 371 by conspiring to defraud the United States.[1] The district court had jurisdiction under 18 U.S.C. § 3231.

Before Thurston went to trial, codefendant Isola, who had been Damon's President, pleaded *nolo contendere*. App. 348a–58a. As part of Isola's plea agreement, he signed a statement of facts in connection with a one-count information charging violation of § 371, and waived preparation of a presentence report. The prosecutors, aware that the district court intended to impose a probationary sentence, dismissed the indictment, filed the information, joined Isola's waiver of the presentence report, and agreed not to appeal. The prosecutors made no recommendation as to Isola's sentence under the federal sentencing guidelines ("the Guidelines"), and made no mention of "amount of loss"

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[1] The indictment alleged that Thurston, Joseph Isola, Beno Kon, and Gerald Cullen caused Damon's physician-clients to order "medically unnecessary" tests by adding a test for ferritin to a pre-existing panel of blood-chemistry tests, and by adding two tests for apolipoprotein to a coronary-disease profile. The indictment further alleged that Isola, Kon, and Cullen—but not Thurston—caused physicians at dialysis facilities to conduct medically unnecessary blood draws and evade Medicare rules by splitting one panel with one payment into two panels with two payments.

or any other Guidelines enhancement. The court sentenced Isola to three years' probation and imposed a $100 special assessment. Isola was not required to cooperate with the government as a condition of his plea agreement. Accordingly, the government did not request, nor did the court grant, a downward departure based on substantial assistance to authorities. App. 77a–78a, 161a–64a, 213a, 348a–58a.

The government offered Thurston a similar plea deal. App. 164a, 303a, 331a–32a. The district court explained that if Thurston declined this offer he might not receive a two-level reduction for acceptance of responsibility. But the court also stated it "would [n]ever increase a person's sentence because he exercised his right to go to trial." App. 358a–59a.

Trial and Initial, Pre-*Booker* Sentencing

Thurston exercised his right to trial. The court ordered an acquittal on the indictment's apolipoprotein allegations. The jury returned a general guilty verdict as to the ferritin allegations on December 17, 2001.

The prosecutors, in contrast to their conduct as to Isola, submitted an adversarial "summary of the facts," which was incorporated nearly verbatim into the presentence report. The government argued (1) there was an "intended loss" of $5,800,000, (2) there was more than minimal planning, (3) Thurston was an organizer or leader of a criminal activity that involved five or more participants and was otherwise extensive, and (4) Thurston obstructed justice by committing perjury at trial. The prosecutors argued for a total offense level of 28 and a sentence of 78 to 97 months' imprisonment, capped by statute at 60 months, three years' supervised release, a $125,000 fine, and a $100 special assessment. App. 315a–16a.

Under the Guidelines, the base offense level was six. Based on facts found by the sentencing judge by a preponderance of the evidence, the Guidelines mandated that the

judge increase Thurston's sentence by 20 offense levels for the amount of intended loss (14 levels), the extent of planning (two levels), and his role in the offense (four levels).[2] App. 316a. These facts were neither found by the jury nor admitted by Thurston. With no criminal history, Thurston fell into Criminal History Category I. *Id.* If based solely on the jury's general verdict, the applicable Guidelines sentencing range would have been zero to six months' imprisonment. U.S.S.G., Sentencing Table. Applying the mandatory enhancements, Thurston's sentence increased to a range of 63 to 78 months' imprisonment, *id.*, capped by § 371 at 60 months, *id.* § 5G1.1(a); 18 U.S.C. § 371. Thurston challenged each of these factual findings and attendant offense-level enhancements in objections to the presentence report, briefing, and oral argument.

The district court departed downward from the Guidelines range to offense level 10, sentenced Thurston to three months' imprisonment and 24 months' supervised release (the first three months in home detention), and imposed a $100 special assessment. App. 345a–46a. The court rested its departure on two grounds. First, the court departed to effectuate the Guidelines' underlying principles of uniformity and proportionality in sentencing, mitigating the disparity between Thurston's sentence and that of his codefendant Isola, who the court found to be the conspiracy's "prime architect." App. 325a–26a. Notwithstanding Thurston's lesser culpability, consistent with the court's earlier admonition that Thurston would not be eligible for

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[2] *See* U.S. Sentencing Guidelines Manual (Nov. 1992) [hereinafter U.S.S.G.] § 2X1.1(a) (base offense level for conspiracy to defraud is same as for fraud); *id.* § 2F1.1(a) (base offense level for fraud is six); *id.* § 2F1.1(b)(1) (14-level increase for loss greater than $5,000,000, up to $10,000,000); *id.* § 2F1.1(b)(2) (two-level increase if offense involved more than minimal planning); *id.* § 3B1.1(a) (four-level increase if defendant was organizer or leader of criminal activity involving five or more participants or was otherwise extensive). The November 1992 Guidelines were used to avoid retroactivity problems. The court did not explicitly rule on the obstruction of justice claim.

a two-level acceptance-of-responsibility reduction, the court punished him more severely than Isola, whose offense level was eight. App. 326a–28a.

Second, the court departed downward because "Thurston's record of charitable work and community service is unique, extensive and extraordinary." App. 325a. The court stated: "I think the record should reflect that in over 14 years of sentencing defendants, it's my judgment that no one had a more extraordinary devotion to charitable work, community service, and especially his dedication to his church." *Id.*

Government's First Appeal

On the government's appeal from the district court's sentence, the court of appeals retroactively applied the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003), which, *inter alia*, changed the appellate standard of review for downward departures from "due deference" to *de novo*, § 401(d)(2) (amending 18 U.S.C. § 3742(e)). App. 273a–89a. The First Circuit held that departing from the Guidelines sentencing range to mitigate the disparity between Isola's and Thurston's sentences was improper. App. 290a–92a. The court also decided *de novo* that Thurston's lifetime of charitable work and community service was not "exceptional enough" to justify a departure. App. 292a–98a. The appellate court vacated the sentence and remanded for imposition of the maximum five-year prison term under the conspiracy statute and a fine. App. 300a.

In response to this decision, the district judge issued a memorandum and order recusing himself, stating "[he was] disinclined to mechanically impose a sentence" mandated by the court of appeals "which is clearly contrary to the objective of the sentencing guidelines and which severely punishes a defendant for exercising a constitutional right. The government should be prohibited from inflicting a harsh and punitive penalty on any citizen for the exercise of a fundamental right." App. 305a.

This Court's Summary Disposition After *Booker*

Thurston filed a petition for writ of certiorari in June 2004. While his petition was pending, this Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005). The Court granted Thurston's petition, vacated the First Circuit's judgment, and remanded for reconsideration in light of *Booker*. App. 237a.

Resentencing on Remand Under *Booker*

On remand to the First Circuit, the court of appeals held that Thurston demonstrated plain error by "show[ing] a reasonable probability that the sentencing judge would, on remand, likely give him a more lenient sentence," and remanded for resentencing before a different judge. App. 230a–33a. The appellate court directed the sentencing judge to consider the government's allegation that Thurston committed perjury at trial, which the government contended was the principal fact distinguishing Thurston from codefendant Isola and justifying a more severe sentence.

During a two-day sentencing hearing, the court considered voluminous briefing and record materials, heard extensive argument, and clearly articulated its reasons for the sentence imposed. App. 46a–226a. The district court rejected two of Thurston's arguments: that the standard of proof for sentence-enhancing facts should be beyond a reasonable doubt and that Thurston should receive a sentence based solely on facts found by the jury (namely, a general finding of conspiracy). App. 48a–49a, 58a–71a, 191a–92a. The court did not disturb the factual findings and resulting 20 levels of sentence enhancements applied at the initial sentencing in 2002. App. 191a–93a, 207a.

The court carefully examined the government's claim that Thurston committed perjury at trial, which was "of considerable importance to [the court's overall sentencing]

analysis," not just in calculating the Guidelines sentencing range but in deciding the effect of the factors to be considered under 18 U.S.C. § 3553(a). App. 191a; *accord* App. 197a. The court emphasized that "perjury goes to the heart of the integrity of the judicial process" and is "a serious offense [that] deserves to be seriously punished." App. 200a. The court "spent many hours studying the record with regard to each of [the government's] three claims," App. 201a, and heard extensive argument, App. 80a–154a. The government withdrew one of its perjury claims, App. 143a, 200a, and the court found that the other two had not been proved, therefore rejecting imposition of an obstruction-of-justice enhancement, App. 197a–207a.

Explaining that it was "called upon to decide what is the most reasonable and appropriate sentence, taking into account among the other [§] 3553(a) factors the Sentencing Guidelines," App. 190a, the court "considered what [the Guidelines] prescribe seriously in this case," App. 215a. "[T]he issue is whether the [§] 3553(a) factors justify and make most appropriate a non-Guideline sentence." App. 192a–93a.

After considering the statutory factors, the court concluded that a sentence of three months' imprisonment and two years' supervised release with the first three months in home confinement,[3] as well as a $25,000 fine within the Guidelines range, was, as mandated by § 3553(a), sufficient, but not greater than necessary, to serve the purposes of sentencing. App. 187a–88a. The court explained:

> [P]rior to the time that I became immersed in this, I frankly expected I would impose a significantly longer sentence. But I've spent many

[3] For the relevant Guidelines range, supervised release with a condition of home detention is a "substitute" for imprisonment. U.S.S.G. § 5C1.1(c)(2), (e)(3). Thus, the sentence is the equivalent of six months' imprisonment followed by an additional term of supervised release.

> hours reading the excellent briefs, examining the pertinent parts of the transcript, and particularly examining whether perjury or obstruction of justice had been proven, which it has not. . . . [¶] I considered giving Mr. Thurston more jail time. . . . But it just would not be fair in the circumstances to do that.

App. 188a; *see also* App. 186a–226a (stating reasons for sentence).

In addition to the Guidelines range, the court considered the need for a sentence to afford adequate specific and general deterrence, to protect the public, to reflect the seriousness of the offense, and to provide just punishment. *See, e.g.*, App. 187a–88a, 216a–18a, 221a. The court also observed Thurston in court, heard his allocution, and considered his personal history and circumstances. *See, e.g.*, App. 147a–49a, 155a–56a, 177a, 216a. The government agreed that the extensive evidence of "good works" could be considered under § 3553(a), and conceded that a variance from the Guidelines range was warranted on that basis. App. 72a–73a, 193a; U.S. Sentencing Mem. 14–17, May 31, 2005; U.S. Sentencing Reply Mem. 14–15, June 8, 2005.

The court also considered "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" under § 3553(a)(6). The court accepted the first sentencing judge's finding that Isola was the "prime architect" of the conspiracy and engaged in more extensive "real offense conduct" than Thurston. App. 193a, 195a, 213a. Further, in the court's judgment, Isola did not unequivocally accept responsibility; Thurston's allocution was essentially equivalent to Isola's *nolo contendere* plea. App. 197a, 213a–14a. Nor did Isola cooperate with the government, as the government confirmed.[4] App. 78a, 213a. Perjury would

[4] The First Circuit's earlier opinion in this case erroneously stated that Isola had cooperated. *See* App. 290a–91a.

have been "a material difference between Thurston and Isola," but the court found that Thurston did not commit perjury at trial. App. 191a, 197a–207a. The only material difference between the codefendants was that Isola pleaded *nolo contendere* and Thurston went to trial. App. 213a–15a. The court reasoned that some lower sentence for Isola might be justified because, theoretically, his plea could have conserved prosecutorial or judicial resources, though the court noted the government had made no such showing. App. 196a. The court concluded there was no legitimate justification for a sentence disparity of more than six months' confinement.

The court also considered "the need for the sentence imposed . . . to promote respect for the law" under 18 U.S.C. § 3553(a)(2)(A). The court found that the government had implicitly made two representations: (1) that a probationary sentence for Isola's "real offense conduct" (or "relevant conduct" under the Guidelines) was sufficient to promote § 3553(a)'s purposes, including the need to reflect the seriousness of the offense and to provide adequate deterrence, and (2) that a probationary sentence would not perpetuate unwarranted disparity. App. 51a–52a, 194a–96a, 209a–10a (discussing U.S.S.G. ch. 6, pt. B, introductory cmt.; *id.* § 6B1.2). The court concluded there was no principled distinction between Thurston and Isola, except that Isola was more culpable. App. 193a–95a. The sentencing scheme enacted by Congress was not, the court explained, intended to result in disparities in these circumstances. App. 177a, 211a–12a. It was the court's judgment that a sentence of six months' confinement and a $25,000 fine would promote respect for the law, and any greater sentence would promote disrespect for the law. App. 208a–18a.[5]

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[5] Thurston timely paid the fine, and had already completed his entire sentence as of November 2004.

Government's Second Appeal

Reviewing the sentence for unreasonableness under *Booker*, the court of appeals defined "the correct procedural approach" as using the Guidelines as the benchmark: courts should first calculate the applicable Guidelines sentencing range and then decide whether to impose a non-Guidelines sentence based on the other § 3553(a) factors. App. 8a. Acknowledging that the district court had followed this procedure, had "provided a detailed explanation of its reasons for not imposing the recommended guidelines sentence," and had "approached Thurston's sentencing with characteristic thoroughness," the First Circuit framed the case as "center[ing] not on the procedures employed, but on the substantive conclusion." App. 8a–9a. The court elaborated:

> In reviewing a particular sentence for reasonableness, we stress the need "for a plausible explanation and a defensible overall result." We also believe that the guidelines "remain[] an important consideration" in sentencing because they "represent[] the only integration of the multiple [sentencing] factors [set forth in § 3553(a)], often reflect past practice, and [bear] the imprimatur of the [Sentencing Commission], [the] expert agency charged with developing them." Thus, we consider the reasonableness of a below-guideline sentence on a sliding scale: "the farther the judge's sentence departs from the guidelines sentence the more compelling the justification based on the factors in § 3553(a) that the judge must offer. . . ."

Id. (citations omitted).

The First Circuit disagreed with the length of the prison sentence (the "substantive conclusion") for three main reasons. First, the court ruled that § 3553(a)(6) does not support the sentence imposed. The First Circuit did not rely on the statutory language ("defendants with similar records who have been found guilty of similar

conduct"), but instead held that Isola and Thurston were not "similarly situated." App. 9a–12a. The First Circuit took the position that "[o]nce Thurston elected to go [to] trial, he was no longer situated similarly to Isola." App. 11a; *accord* App. 10a, 18a. Thus, in the appellate court's view, the district court was prohibited from tailoring Thurston's sentence to avoid what the district court found would be an unwarranted disparity with Isola's probationary sentence. The First Circuit dismissed any concerns about burdening Thurston's constitutional jury-trial right. App. 11a–12a. Second, the court of appeals believed that the district court did not give enough weight to the "seriousness of the offense" under § 3553(a)(2)(A). App. 12a–14a. Third, the court of appeals held that the district court erred in concluding the sentence was sufficient to serve the goal of general deterrence under § 3553(a)(2)(B). App. 14a–16a.

The First Circuit acknowledged the consistent sentences imposed by two different district judges, and conceded there were several facts—some of which previously could not be considered under the "mandatory" Guidelines regime in effect before *Booker*—that "support[ed] a below-guideline sentence." App. 16a. But in the court's view, those facts should be given less weight in the sentencing calculus. The court did not explain why it believed these facts justified only a "modest" variance from, or a "somewhat shorter" sentence than, the Guidelines range, App. 17a–18a, or what quantum of evidence would justify variances of particular lengths of prison time.

The court of appeals acknowledged that appellate courts are "not well-suited to determine *the* appropriate sentence for a defendant." App. 18a. Yet the court volunteered that it "would be inclined to impose a sentence at or near the guideline recommendation if it were acting as the sentencing court." App. 19a. Although typically the court would remand for resentencing, in this case, the court prospectively opined "that a sentence of fewer than 36

months' imprisonment would fail reasonableness review in the present circumstances." *Id.* The court instructed that "absent an extraordinary development, the [district] court must impose a sentence of no less than 36-months' imprisonment." *Id.*

Thurston had argued that sentence-enhancing facts must be proved beyond a reasonable doubt, and therefore applying 20 levels of Guidelines enhancements based on evidence which fell well short of that standard violated his constitutional rights. The court of appeals summarily dismissed that argument, App. 6a n.4, even while elsewhere stating that although the intended loss finding (made under a preponderance standard) and resultant 14-level enhancement "was sustainable, . . . the issue presented a somewhat close question," App. 17a.

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Important Question Whether Facts That Increase a Defendant's Sentence Must Be Proved Beyond a Reasonable Doubt.

1. In the wake of *Booker*, this Court has yet to address whether the Fifth Amendment right to due process permits a court to increase a defendant's sentence based on facts found by a preponderance of the evidence or whether due process requires those facts to be proved beyond a reasonable doubt. Resolving this question is the next logical step in the progression from *Winship* to *Apprendi* to *Blakely* to *Booker*. The Court in *Booker* did not address whether increasing a sentence based on facts proved by a preponderance of the evidence violates the Fifth Amendment. Rather, the Court held only that excising the provision making the Guidelines mandatory (and an associated appellate review provision) remedied the violation of a defendant's Sixth Amendment right to jury trial. The standard of proof required by the Fifth Amendment remains an open question and is squarely presented in this case.

2. In *Apprendi v. New Jersey*, the Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). *Apprendi*'s holding was based in part on the Fifth Amendment, which provides a constitutional protection "of surpassing importance: the proscription of any deprivation of liberty without 'due process of law.'" *Id.* at 476.

The Court in *Winship* expressly acknowledged that the requirement of proof beyond a reasonable doubt is rooted in the Due Process Clause. *In re Winship*, 397 U.S. 358, 364 (1970). The Court explained that the reasonable-doubt standard plays "a vital role in the American scheme of criminal procedure" and "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. Because convictions bring a loss of liberty and a social stigma, the government should bear the risk of any error. *Id.* at 363–64. Under *Winship*, proof beyond a reasonable doubt is required for "every fact necessary to constitute the crime charged." *Id.* at 363.

Later cases "made clear beyond peradventure that *Winship*'s due process . . . protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi*, 530 U.S. at 484 (citation omitted). *Mullaney v. Wilbur*, 421 U.S. 684 (1975), left no doubt that facts that increase punishment, not just those that go to guilt or innocence, must be proved beyond a reasonable doubt. In *Mullaney*, the Court unanimously held that due process required that the absence of heat of passion be considered an element of the offense of murder and thus be proved beyond a reasonable doubt. *Id.* at 691–92. The Court concluded that due process protects a defendant's interest in avoiding the greater penalties and consequences that attach to a murder as opposed to manslaughter conviction. *Id.* at 698.

The path from *Winship* to *Apprendi* was not entirely straight. In *McMillan v. Pennsylvania*, for example, the Court held that state legislatures may distinguish between elements of a crime and sentencing factors, with Fifth and Sixth Amendment protections attaching only to the former.[6] 477 U.S. 79 (1986).

In *Jones v. United States*, the Court construed certain provisions of a federal criminal statute to constitute elements of a crime rather than sentencing factors. 526 U.S. 227 (1999). Harking back to *Mullaney* and *Winship*, yet constrained by *McMillan*, the Court concluded that the doctrine of constitutional avoidance mandated this construction because of the constitutional problems that would ensue if the Court were to conclude otherwise. The Court explained that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6.

After the Court in *Apprendi* further distanced itself from the reasoning in *McMillan*, and reaffirmed the core animating principles of *Winship* and *Mullaney*, a plurality of the Court stepped back toward *McMillan* in *Harris v. United States*, 536 U.S. 545 (2002), concluding that the Constitution permits a mandatory minimum sentence to be imposed based on a fact found by a judge using a preponderance standard. The plurality's conclusion rested largely on categorizing the fact to be proven—brandishing

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[6] In *United States v. Watts*, 519 U.S. 148, 157 (1997) (per curiam), the Court in *dictum* cited *McMillan* for the broad proposition that "the preponderance standard at sentencing generally satisfies due process." *Id.* at 156. But the Court had no call to wrestle with the due process concerns implicated by a preponderance standard because the case "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4.

a weapon—as a "sentencing factor." *Id.* at 558. As discussed below, the Court has since definitively rejected the notion that the label given to a factual finding determines whether the Fifth and Sixth Amendment are violated when a judge finds that fact by a preponderance.

In *Blakely v. Washington*, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. 296, 303 (2004). Consequently, the Court held that a sentence imposed under a state's determinate sentencing scheme based on facts found by the judge rather than by the jury violated the Sixth Amendment. The Court did not directly address the Fifth Amendment implications of imposing a sentence based on facts found by the judge by a preponderance of the evidence.[7]

In *United States v. Booker*, the Court held that the Guidelines sentencing scheme violated the Sixth Amendment by requiring judges to make factual findings that increased a defendant's sentence beyond that which would be imposed based on the facts found by the jury or admitted by the defendant. 543 U.S. 220 (2005). In the so-called "remedial" majority opinion, the Court held that excising the statutory provision making the Guidelines mandatory remedied this Sixth Amendment violation. *Id.* at 245. Although the majority did not address the Fifth Amendment right to due process, Justice Thomas, dissenting from the remedial opinion, stated: "The Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the

[7] The protections provided by the Fifth and Sixth Amendments are distinct. *See Winship*, 397 U.S. at 364 (holding that due process required proof beyond a reasonable doubt even though no Sixth Amendment issue was presented); *Apprendi*, 530 U.S. at 476–77 (recognizing the distinct protections afforded by the Fifth and Sixth Amendments).

sentence beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant." *Id.* at 319 n.6 (Thomas, J., dissenting).

That *Booker* requires the Guidelines to be treated as advisory rather than mandatory does not avoid the Fifth Amendment violation inherent in allowing a defendant's sentence to be increased based on facts found by the judge by a preponderance of the evidence. Even under an advisory Guidelines system, the courts still must determine, and review, sentences based on facts that may increase a defendant's sentence beyond that which would be imposed based on the facts found by the jury or admitted by the defendant.

The constitutional problem is not cabined to facts that would increase the Guidelines sentencing range; it extends to any fact that increases the sentence. But the constitutional problem is compounded when the Guidelines are weighted more heavily than other statutory factors that must be considered. Indeed, to the extent that appellate courts, in conducting review for unreasonableness, curb the district court's discretion by giving undue weight to the Guidelines, *see infra* Section II, applying a preponderance standard could violate the Sixth Amendment.

3. Although the courts of appeals have generally found that *Booker* does not require proof beyond a reasonable doubt,[8] neither *Booker* nor *Blakely* addressed whether Fifth

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[8] *See United States v. Yeje-Cabrera*, 430 F.3d 1, 17 (1st Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 525–26 (2d Cir.), *cert. denied*, 126 S. Ct. 1665 (2006); *United States v. Morris*, 429 F.3d 65, 72 (4th Cir. 2005); *United States v. Mares*, 402 F.3d 511, 519 & n.6 (5th Cir.), *cert. denied*, 126 S. Ct. 43 (2005); *United States v. Yagar*, 404 F.3d 967, 972 (6th Cir. 2005); *United States v. Price*, 418 F.3d 771, 788 (7th Cir. 2005); *United States v. Pirani*, 406 F.3d 543, 551 n.4 (8th Cir.), *cert. denied*, 126 S. Ct. 266 (2005); *United States v. Magallanez*, 408 F.3d 672, 684–85 (10th Cir.), *cert. denied*, 126 S. Ct. 468 (2005); *United States v. Duncan*, 400 F.3d 1297, 1304–05 (11th Cir.), *cert. denied*, 126 S. Ct. 432 (2005). A Third Circuit decision, holding that defendants are not entitled to have sentence-enhancing facts proved beyond a reasonable doubt, has been vacated in light of a grant of rehearing *en banc*. *United States v. Grier*, 449 F.3d 558 (3d Cir.), *reh'g en banc granted, opinion vacated*, 453 F.3d 554 (3d Cir. 2006).

Amendment Due Process Clause requires the use of a reasonable-doubt standard. This Court, in the line of cases from *Winship* to *Apprendi*, recognized that due process may require proof beyond a reasonable doubt in sentencing.

In the aftermath of *Booker*, the Ninth and Tenth Circuits have recognized that using a heightened standard of proof may sometimes be appropriate in sentencing decisions. *See United States v. Dazey*, 403 F.3d 1147, 1177 (10th Cir. 2005) (approving a district court's use of a heightened standard when assessing the reliability of the Guidelines range in particular cases); *United States v. Dare*, 425 F.3d 634, 642 (9th Cir. 2006) ("[W]hen a sentencing factor has an extremely disproportionate effect on the sentence . . . , the government may have to satisfy a clear and convincing standard." internal quotations omitted)).

Additionally, several district courts have held sentence-enhancing facts must be proved beyond a reasonable doubt. *See, e.g., United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1027–29 & n.8 (D. Neb.), *aff'd*, Nos. 05-1448, 05-1633, 2005 WL 3440785 (8th Cir. Dec. 16, 2005); *United States v. Pimental*, 367 F. Supp. 2d 143, 153–54 (D. Mass. 2005).

This case presents an opportunity for the Court to decide the question left open by *Booker*: the standard of proof required for finding facts that increase a defendant's sentence under an advisory Guidelines system.

II. This Court Should Resolve the Important Question Whether the Sixth Amendment Permits an Appellate Court Reviewing a Sentence For Unreasonableness to Give the Guidelines Sentencing Range Greater Weight Than the Other 18 U.S.C. § 3553(a) Factors and to Give Less Deference to District Courts That Impose Sentences Outside That Range.

1. Part of *Booker*'s remedy for the recognized Sixth Amendment violation represented by the mandatory Guidelines regime was to excise 18 U.S.C. § 3553(b), which had required a district court to impose a sentence within

the Guidelines range unless the court found an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. *Booker*, 543 U.S. at 259–60. The Court also excised § 3742(e), which had been revised in 2003 to require *de novo* review of any departure from the Guidelines range, thus "mak[ing] Guidelines sentencing even more mandatory than it had been." *Id.* at 260–61. *Booker* thus made § 3553(a) the governing sentencing law, rendering the Guidelines "effectively advisory" rather than "mandatory." *Id.* at 245–46. *Booker* also prescribed a unitary standard of review for all sentences within or outside the Guidelines range, such that "[t]he courts of appeals review sentencing decisions for unreasonableness." *Id.* at 264.

Booker gave little guidance on what review for "unreasonableness" entails, except to refer generally to reasonableness standards in other contexts. *Booker*, 543 U.S. at 262–63. Nor did the Court give much guidance on what role the "advisory" Guidelines are to play on review of a district court's sentence. Justice Scalia expressed concern "that no one knows . . . how advisory Guidelines and 'unreasonableness' review will function in practice." *Id.* at 311 (Scalia, J., dissenting in part). More specifically, there was a concern that courts of appeals may "conclude . . . that little has changed" and "might seek refuge in the familiar and continue (as the remedial majority invites, though the merits majority forbids) the 'appellate sentencing practice during the last two decades.'" *Id.* at 311–12. Justice Scalia questioned whether "appellate review for 'unreasonableness' [would] preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges." *Id.* at 313.

2. Twenty months after *Booker*, these concerns have become manifest. The courts of appeals have articulated conflicting interpretations of the nature and scope of review for unreasonableness. Five circuits, including the First Circuit, have adopted a "sliding scale" rule, requiring

increasingly compelling justifications from (and consequently affording less deference to) the district court the farther a sentence departs from the Guidelines range—essentially creating a presumption of unreasonableness for outside-Guidelines sentences.[9] App. 9a; *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir.), *cert. denied*, 126 S. Ct. 2054 (2006); *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006); *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005). The Second Circuit, in contrast, has "yet to adopt this standard as a rule." *United States v. Rattoballi*, 452 F.3d 127, 134–35 (2d Cir. 2006). In effect, by affording the Guidelines unduly substantial weight in comparison to the other § 3553(a) factors and by affording less deference to district courts that impose sentences that vary from the Guidelines range, these courts have resurrected a sentencing scheme that resembles too closely the "mandatory" Guidelines scheme held unconstitutional in *Booker*. The First Circuit applied this type of unconstitutional scheme to Thurston in this case.

Although the First Circuit has nominally rejected a presumption of reasonableness for within-Guidelines sentences, *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), the court's rulings have gone even farther than other courts toward resurrecting the pre-*Booker* sentencing scheme. Even though the First Circuit "[does] not find it helpful to talk about the guidelines as 'presumptively' controlling," the court has stated that "[a]t the same time, the guidelines cannot be called just 'another factor' in the statutory list." *Id.* And despite

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[9] The courts of appeals are divided on the related question of whether there is a presumption of reasonableness for within-Guidelines sentences. As discussed *infra*, the First Circuit has nominally rejected a presumption of reasonableness, but the court's interpretation of its review authority, the weight it accords the Guidelines, and the lack of deference it gives to district judges who impose sentences outside the Guidelines range nevertheless conflicts with *Booker*.

the avowed rejection of a presumption, the First Circuit in *Jiménez-Beltre* characterized as "adroit" and "a more useful compass," *id.*, the district court's decision to give the Guidelines "substantial weight" and to depart from them only if "there [were] clearly identified and persuasive reasons," *id.* at 516–17.

The *Jiménez-Beltre* majority's semantic gymnastics drew a sharp dissent: "There is a significant difference between treating the guidelines as important and giving them substantial weight. There is scant difference between treating a guidelines sentence as presumptively controlling and stating that the court will depart from that sentence only for 'clearly identified and persuasive reasons.'" 440 F.3d at 524 (Lipez, J., dissenting). Judge Lipez expressed concern that the court "gave the guidelines a weight and a centrality that uncomfortably approximate the mandatory guidelines system that the Supreme Court found unconstitutional in *Booker*." *Id.* at 524–25. He pointed out that "there is no assumption [in § 3553(a)] that a guidelines sentence complies with the purposes of the sentencing statute" and "[a]s a matter of statutory construction, there is nothing in the language of [§] 3553(a) that justifies attributing to the guidelines 'substantial weight' in the sentencing decision." *Id.* at 526. Judge Lipez warned that "given the close divisions on the [Supreme] Court about the post-*Booker* role of the guidelines, and given the new composition of the Court, it would be foolhardy to ignore the constitutional dangers of adopting an approach to the guidelines post-*Booker* that approximates, in a new guise, the mandatory guidelines."[10] *Id.* at 528 n.11.

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[10] Informal evidence suggests that concerns about a *de facto* return to a mandatory Guidelines regime are well founded. See, e.g., Posting of Douglas A. Berman to Sentencing Law & Policy Blog, http://sentencing.typepad.com/sentencing_law_and_policy/2006/09/tracking_reason.html (Sept. 1, 2006), which presents a categorized list of published appellate decisions that review sentences for unreasonableness. This list, though not

(Continued on following page)

In cases after *Jiménez-Beltre*, the First Circuit has given increasingly more weight to the Guidelines, prompting another member of the court to dissent from the court's evolving unconstitutional doctrine. In *United States v. Navedo-Concepción*, 450 F.3d 54, 60 (1st Cir. 2006), the court affirmed a sentence where the district court had declared that "it will generally heel to the guidelines [when] imposing criminal punishment." Judge Torruella, dissenting, expressed concern that the First Circuit was "like a glacier in the ice age, inch by slow inch, regressing to the same sentencing posture we assumed before the Supreme Court decided *Booker*." *Id.* at 60 (Torruella, J., dissenting).[11]

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comprehensive, demonstrates a disturbing pattern in which reversals of below-Guidelines sentences (46 instances) and affirmances of above-Guidelines sentences (27 instances) far outnumber the reversals for above-Guidelines sentences (4 instances) and affirmances of below-Guidelines sentences (8 instances). *Id.* The affirmances of within-Guidelines sentences are depicted as "[f]ar too many to list" with only a single instance of a within-Guidelines sentence being reversed. *Id.*; *see also* U.S. Sentencing Comm'n, Final Report on the Impact of *United States v. Booker* on Federal Sentencing 30 (Mar. 2006) (indicating a similar distribution of appellate outcomes).

[11] The substantial weight accorded to the Guidelines puts the First Circuit squarely at odds with the reasoning of sister circuits that have rejected a presumption of reasonableness. For example, the Eleventh Circuit reasoned that "a district court's determination that the Guidelines range fashions a reasonable sentence, necessarily must be a case-by-case determination" and therefore "[s]o long as the district court considers the Guidelines, we do not believe it is appropriate to dictate a 'strength' of consideration applicable in every case." *United States v. Hunt*, No. 05–11671, 2006 WL 2285715, at *3–4 (11th Cir. Aug. 10, 2006). Similarly, the Ninth Circuit explained that "[d]istrict courts neither should, nor can, ignore [their post-*Booker* discretion] by placing undue weight on the Guideline portion of the sentencing chemistry" and "must not accord [the Guideline calculation] greater weight than they accord the other § 3553(a) factors." *United States v. Zavala*, 443 F.3d 1165, 1171 (9th Cir. 2006).

In this case, the First Circuit has moved yet closer to replicating *de facto* the mandatory sentencing scheme that *Booker* held unconstitutional. Under the guise of review for unreasonableness, the First Circuit dictated a substantive result to the district court, remanding with an explicit mandate to impose a sentence of at least three years' imprisonment. The First Circuit made clear this was only "the minimum sentence" and "this court would be inclined to impose a sentence at or near the guideline recommendation [of five years]." App. 19a. The First Circuit gave substantial weight to the Guidelines "because they 'represent[] the only integration of the multiple [sentencing] factors [set forth in § 3553(a)], often reflect past practice, and [bear] the imprimatur of the [Sentencing Commission], [the] expert agency charged with developing them.'" App. 8a–9a (quoting *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006)). Moreover, the court articulated a "sliding scale" approach to reviewing the "reasonableness" of the district court's "below-guideline sentence": "'the farther the judge's sentence departs from the guidelines sentence the more compelling the justification based on the factors in § 3553(a) that the judge must offer. . . .'" App. 9a (quoting *Smith*, 445 F.3d at 4 (quoting *Dean*, 414 F.3d at 729)).

The First Circuit's deference to the Guidelines range and its "sliding scale" rule for justifying departures from the Guidelines range too closely resemble the "mandatory" or "presumptive" regime held unconstitutional in *Booker*. Its "sliding scale" doctrine is, in function, akin to a presumption of unreasonableness for outside-Guidelines sentences. The doctrine gives the Guidelines range, calculated based on facts found by a judge by a preponderance of the evidence, a centrality and weight that impermissibly burdens a defendant's Sixth Amendment jury-trial rights. Further, the First Circuit's interpretation of its review power more closely resembles the substantive *de novo* review of departures from the otherwise "mandatory" Guidelines range that existed before § 3742(e) was excised in *Booker* than a deferential review of a district court's

sentencing decision under an "advisory" Guidelines system.

This Court should grant a writ of certiorari to provide guidance on the proper weight to be given the advisory Guidelines range and the degree of deference to be given outside-Guidelines sentences when appellate courts review sentences for unreasonableness. This case provides an excellent vehicle for doing so because of the carefully developed record in the district court and the substantial discussion of the relevant issues in the First Circuit.

III. The Writ Should Be Granted to Resolve Fundamental Issues Regarding District Courts' Discretion Under 18 U.S.C. § 3553(a) to Avoid Unwarranted Disparities Between Codefendants' Sentences.

1. When fashioning a sentence for a defendant, a sentencing court must consider all of the factors under 18 U.S.C. § 3553(a), including "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," § 3553(a)(6). Here the sentencing court extensively analyzed Thurston and codefendant Isola, and concluded that § 3553(a)(6) applied and should be a significant consideration, among other factors, in determining the appropriate sentence. *Supra* at 7–9. The defendants had "similar records" (in Criminal History Category I, with no prior history) and were "found guilty of similar conduct" (a conviction under § 371 for the same conspiracy, based on business practices when they were both Damon executives during the same years). The main difference between Thurston and Isola was that Isola pleaded *nolo contendere* (and, notably, did not cooperate with the government), whereas Thurston went to trial. *Supra* at 8–9. The sentencing court found that Isola was *more* culpable than Thurston, and rejected the government's argument that Thurston had committed perjury at trial. *Supra* at 6–8.

The court of appeals did not rely on the statutory language ("defendants with similar records who have been found guilty of similar conduct"), but instead held that Isola and Thurston were not "similarly situated." App. 9a–12a. The First Circuit took the position that "[o]nce Thurston elected to go [to] trial, he was no longer situated similarly to Isola." App. 11a. Therefore, in the First Circuit's view, the district court was prohibited from tailoring Thurston's sentence to avoid what the district court found would be an unwarranted disparity with Isola's probationary sentence.[12]

This case thus presents an important issue of statutory interpretation, namely, whether the phrase "defendants with similar records who have been found guilty of similar conduct" in § 3553(a)(6) does not apply merely because one defendant was convicted at trial and his codefendant was convicted after pleading *nolo contendere*. The statute's meaning is plain, and the First Circuit's conclusion rests on a nonsensical reading, in conflict with this Court's statutory construction doctrine. *E.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (citations and quotations marks omitted)).

2. Encompassing this specific statutory interpretation issue is a broader issue regarding a sentencing court's

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[12] The First Circuit reached this decision despite the government's express concession in the district court that the sentencing disparity between Isola and Thurston could be considered under § 3553(a)(6) because they were codefendants convicted of the same crime. In briefing on appeal, the government conceded its forfeiture of any contrary argument, though it disputed Thurston's claim of waiver. Reply Br. for Gov't 3 & n.2, Apr. 13, 2006. The First Circuit did not expressly address waiver or forfeiture, nor did the court articulate its reasoning in terms of plain-error review.

discretion to avoid disparity between the sentence of a defendant who exercises his constitutional right to trial and that of a codefendant who pleaded *nolo contendere* but is otherwise similar.

It has long been recognized that since passage of the Sentencing Reform Act there has been an unintended but substantial shift in discretion and authority from district courts to prosecutors.[13] Under the mandatory Guidelines system, when the exercise of prosecutorial discretion (such as charging or plea-bargaining practices) would occasionally result in unfair prejudice to an individual defendant, a district court had little power to remedy it, except in the limited circumstances in which there was legal authority to depart from the Guidelines range.[14] The change to an advisory Guidelines system following *Booker* has not restored the balance of power or eliminated unfairness to defendants in the sentencing system.

Both the remedial majority and dissenting opinions in *Booker* voiced related concerns, albeit in a different context, about plea bargaining and the balance of power

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[13] Fed. Courts Study Comm., Report of the Federal Courts Study Committee 138 (Apr. 2, 1990) ("[T]he rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system. . . . [S]ome prosecutors (and some defense counsel) have evaded and manipulated the guidelines in order to induce the pleas necessary to keep the system afloat . . . .").

[14] Yet as the Commission has explained, adherence to the Guidelines does not necessarily avoid unwarranted sentencing disparity. "[S]ome of the components of guidelines implementation that were designed to ensure uniformity have proven inadequate to the task or have not worked as intended." U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing 82 (Nov. 2004). For example, "a variety of evidence suggests that disparate treatment of similar offenders is common at presentencing stages," *id.* at 92, and "several lines of evidence suggest that uneven charging and plea bargaining remain a source of unwarranted sentencing disparity," *id.* at 141.

between prosecutors and sentencing courts. The remedial majority stated that Congress intended "to increase the likelihood that offenders who engage in similar real conduct would receive similar sentences," which is important to plea bargaining because such bargaining "takes place *in the shadow of* (*i.e.*, with an eye towards the hypothetical result of) a potential trial." *Booker*, 543 U.S. at 255. The remedial majority was concerned that if prosecutors could decide which sentencing factors "would be placed beyond the reach of the judge entirely," prosecutors would usurp "[judicial] power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment." *Id.* at 256–57. The dissenting justices also emphasized the importance of "certainty of expectations in the plea process." *Id.* at 289 (Stevens, J., dissenting). The dissent noted the shift in power from judges to prosecutors, and emphasized the problem of "fact bargaining[,] [which is] quite common under the current system." *Id.* at 290 & n.11 (citing authorities).

This case brings these longstanding concerns into bold relief. At Isola's sentencing, armed with the same information as it had later at Thurston's sentencing, the government agreed to what it knew would be a probationary sentence, and agreed not only to waive its right to appeal, but also to forgo a presentence report, which would have addressed whether any enhancements were warranted.[15] *Supra* at 2–3. Isola was not required to cooperate as a condition of his plea agreement and, accordingly, the government did not seek a substantial-assistance departure. *Supra* at 3.

As the district court found, the government implicitly represented that a probationary sentence was sufficient to promote the statutory purposes of § 3553(a)—including

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[15] The government joined in Isola's "waiver" of a presentence report, even though Congress had long ago abolished the right to waive the requirement. U.S.S.G. § 6A1.1 & cmt.

the need to reflect the seriousness of the offense and to afford adequate deterrence—and would not perpetuate unwarranted disparity. *Supra* at 9. As the government explained, it believed that obtaining a conviction, in and of itself, would send a deterring message to others. App. 210a, 217a; Opening Br. for Gov't, Jan. 30, 2006. There was also an implicit representation that the government would claim no enhancements, such as actual or intended loss, associated with the individual coconspirators' "relevant conduct."[16] If the prosecutors believed there was loss associated with the coconspirators' conduct, they were obligated to bring that information to the court's attention at Isola's sentencing.[17]

The Commission believed "[r]eliable fact-finding" to be a core value of the Guidelines system because it "is essential to procedural due process and to the accuracy and uniformity of sentencing." U.S.S.G. ch. 6, pt. A, introductory cmt. The system was intended to have a "rationalizing impact" on plea bargaining by "creat[ing] a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place." *Id.* ch. 1, pt. A, introductory cmt. Even as prosecutors' discretion in

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[16] *See* U.S.S.G. § 1B1.3(a) ("relevant conduct" includes acts and omissions of defendant as well as others in furtherance of conspiracy, and all resulting or intended harm); *id.* § 1B1.3, cmt. background (conduct not formally charged or not element of offense may enter into sentencing); *id.* § 2F1.1, cmt. n.6 (cumulative loss produced by common scheme should be used in determining offense level).

[17] *See* U.S.S.G. § 6B1.4(a) (stipulation of facts accompanying plea agreement must set forth relevant facts and circumstances of actual offense conduct, and must not contain misleading facts); *id.* § 6B1.4(b) & cmt. (parties should fully disclose actual facts, and then explain to court why disposition of the case should differ from that which such facts ordinarily would require under Guidelines); *id.* § 6B1.2(a) & cmt. (even when plea agreement includes dismissal of charge, may not restrict scope of relevant conduct); *id.* § 1B1.8, cmt. n.1 (even when cooperation agreement provides that self-incriminating information will not be used in calculating sentence, government not authorized to withhold information from court).

plea bargaining has expanded, as the district court noted, the government shares responsibility with the court for ensuring there is no unwarranted disparity. App. 218a. That responsibility does not "cease[] upon the . . . entry of a guilty plea; to the contrary, the [prosecutor] has a continuing obligation to assist the court in its determination of the sentence to be imposed." U.S. Dep't of Justice, *United States Attorneys' Manual* 9-27.710 (2d ed. 2000 & Supp. 2002-1).[18] In this case, the prosecutors disregarded their obligations at Isola's sentencing to secure an early felony conviction by plea, only to change tactics at Thurston's sentencing and argue a litany of sentence-enhancing facts, effectively punishing him more severely for declining the plea offer and exercising his right to trial.

The district court believed it had ample discretion to tailor a sentence for Thurston that varied substantially from the Guidelines range urged by the government. The court explained that for Thurston to suffer a sentence any greater than six months' confinement and a $25,000 fine would constitute an "unwarranted sentence disparit[y]," 18 U.S.C. § 3553(a)(6). *Supra* at 7–9. Further, the court considered "the need for the sentence imposed . . . to promote respect for the law," 18 U.S.C. § 3553(a)(2)(A), and found that any greater sentence not correcting for this unwarranted disparity would undermine respect for the law. Additionally, the court reasoned that Congress did not intend to authorize disparity resulting solely from the conduct of prosecutors in the exercise of their discretion, with no material differences between defendants, nor did it intend to shift

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[18] *See also id.* 9-27.710 (prosecutors should assist court by attempting to ensure relevant facts are brought to court's attention fully and accurately); *id.* 9-27.400 (plea bargaining must honestly reflect totality and seriousness of defendant's conduct and any departure to which prosecutor agrees); *id.* (total amount of money involved in fraudulent scheme considered even if defendant pleads guilty to single count); *id.* (spirit of Guidelines and Department policy violated if plea bargain based on prosecutor's and defendant's agreement that departure is warranted, but prosecutor does not reveal it to court).

this sort of discretion from judges to prosecutors. *Supra* at 9.

The First Circuit concluded that under § 3553(a)(6), a disparity of five years' imprisonment was warranted as a matter of law based on the sole fact that Isola pleaded *nolo contendere* and Thurston went to trial.[19] App. 9a–12a. Yet the First Circuit also acknowledged that the sentencing disparity between Isola and Thurston "could justify a somewhat reduced sentence" under § 3553(a)(2)(A) because "*too* wide a divergence between the sentence imposed on Isola and Thurston could negatively affect the public's 'respect for the law'" and could "undermine the accepted notion that similar conduct should be punished in a somewhat similar manner." App. 18a. Despite the public disrespect it would engender, the court of appeals' holding under § 3553(a)(6) has taken away district courts' discretion to find such disparity unwarranted and to act to avoid it.

The Court in *Booker* emphasized that the advisory Guidelines system would "maintain[] flexibility sufficient to individualize sentences where necessary." *Id.* at 264–65. The Court should now put flesh on the bones of that statement and make clear that district courts have discretion under § 3553(a) to fashion an individualized, just

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[19] This case may also give occasion to clarify whether a district court's discretion to mitigate sentencing disparities overlaps with this Court's doctrine on prosecutorial and judicial vindictiveness under the Due Process Clause. Although this case may well present facts that would give rise to a presumption of prosecutorial vindictiveness under the principles set forth in this Court's decisions, *see, e.g.*, *Alabama v. Smith*, 490 U.S. 794 (1989); *United States v. Goodwin*, 457 U.S. 368 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Blackledge v. Perry*, 417 U.S. 21 (1974), the First Circuit erred by effectively limiting the circumstances in which a district court has discretion to reduce codefendant sentencing disparities under § 3553(a) to circumstances that otherwise would give rise to a presumption of vindictiveness. *See* App. 10a–11a (citing, *inter alia*, *Alabama v. Smith*, 490 U.S. 794; *Bordenkircher v. Hayes*, 434 U.S. 357).

sentence that varies substantially from the Guidelines range when necessary to prevent unwarranted disparity between the sentence of a defendant who exercises his constitutional right to trial and that of a codefendant who pleads *nolo contendere* but is otherwise similar.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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